FILED
APR 30 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 92

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, a South Dakota Corporation, on Behalf of Itself and All Other Insurance Companies Who Were Shareholders in the USAFORM Hail Pool, STUYVESANT INSURANCE COMPANY, a New York Corporation, on Behalf of Itself and All Other Insurance Companies Who Employed U. S. & Foreign Management, Ltd. and USAFORM Pan-American, Ltd. As Reinsurance Brokerage Agents; USAFORM Hail Pool, Inc., a Florida Corporation; U. S. & FOREIGN MANAGEMENT, LTD., a New York Corporation; U. S. & FOREIGN MANAGEMENT, INC., a Florida Corporation, BARBARA MURPHY, As Receiver for Each of Said Corporations; USAFORM Pan-American, Ltd., a Delaware Corporation,

Petitioners,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The above-named Petitioners, by their undersigned attorney of record, pray that a Writ of Certiorari issue to review the judgment entered in this case on March 6, 1969, by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Federal District Court Summary Final Judgment was issued November 14, 1966 (R. 254), but an opinion was not written by that Court. The opinion of the Circuit Court of Appeals (R. 265) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 6, 1969 (R. 283). On April 3, 1969, the Court of Appeals denied Petitioners' Petition for a Rehearing (R. 299). The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1), U. S. Code, 1964, Volume 7, Section 1254(1), Title 28, page 5958.

QUESTIONS PRESENTED FOR REVIEW

1. When the terms of an insurance policy specifically insure property held by the named insured "in any capacity, whether legally liable therefor or not", and the insurer knew all the facts including:

(a) the fact that the third party owned the property insured under the policy;

(b) the fact that the insurance policy contemplated management by the named insured of the third party's property;

(c) the fact that the third party was relying on the protection afforded by the insurance policy; and

(d) the proceeds of any recovery under the policy will belong to the third party;

does the third party have the right of direct action on the policy as a third party beneficiary?

2. When the terms of an insurance policy specifically insure property held by the named insured "in any capacity, whether legally liable therefor or not", and the insurer knew all the facts including:

(a) the fact that the third party owned the property insured under the policy;

(b) the fact that the insurance policy contemplated management by the named insured of the third party's property;

(c) the fact that the third party was relying on the protection afforded by the insurance policy; and

(d) the proceeds of any recovery under the policy will belong to the third party;

is the third party a "real party in interest" under Rule 17(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., entitled to sue directly on the policy?

3. Where the Court of Appeals failed to consider an error specified and a question presented by appellants, has that Court denied appellants their right of appeal, thus justifying the issuance of a Writ of Certiorari by this Court?

4. Is the Summary Final Judgment issued below in conflict with the decisions of the Supreme Court of the State of Florida which forbid granting summary judgment where there remains any possible issue of material fact and requires that all inferences of fact from the proof proffered be drawn against the movant and in favor of the party opposing the motion?

STATUTES

Rule 17(a) Federal Rules of Civil Procedure, 28 U.S.C.A.:

> "a. Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."

Florida Statutes, § 626.0605:

> "*Misrepresentations in adjustment of claims.*—No person shall in connection with adjusting any claim, loss or damage under a contract or policy of insurance, misrepresent to an insured or any other person having an interest in the proceeds payable under such contract or policy, the terms, coverage or effect of such contract or policy, for the purpose and with the intent of effecting settlement of such claim, loss or damage under such contract or policy on less favorable terms than those provided in and contemplated by such contract or policy."

STATEMENT OF THE CASE[1]

This is a suit on a Fidelity Bond occasioned by the theft of monies held in trust for others. The thief was the sole stockholder, and admittedly, the alter ego of the trustee corporation, designated as the named insured in the Fidelity Bond (R. 5, 6). The principal issue before the Circuit Court of Appeals was whether the beneficial owners of the stolen property had the right of direct action against the insurer or whether the action had to be brought by the named insured, who was the thief.

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1. This case involves three groups of Claimants, U. S. & Foreign Management, Ltd., and the insurance companies for which it was the insurance broker, USAFORM Pan American, Ltd., and the insurance companies for which it was the insurance broker, and USAFORM Hail Pool, Inc., and the insurance companies participating in the Hail Pool. Throughout the litigation the first two groups of insurance companies, those doing business with U. S. & Foreign Management, Ltd., and those doing business with USAFORM Pan American, Ltd., are referred to as the underwriters group and the third group of insurance companies, those doing business with USAFORM Hail Pool, Inc., are referred to as the Pool Participants. The facts and legal principles involved are substantially the same for the three groups and the Courts below treated the three groups in the same manner, which was appropriate. As F & D's underwriter testified on deposition (R. 186):

> "Q. So the money that the underwriters group had would be protected by virtue of Section 5 of the bond just as much as the Hail Pool Participants' money would be protected.
> A. That is correct. In connection with a dishonest act.
> Q. Now, actually, to your knowledge, F & D's knowledge of the insureds business and the policy, Section 5, that all contemplate a management of funds belonging to others, didn't it?
> A. That is correct."

In the interest of brevity we will limit our recitation of facts to USAFORM Hail Pool because the story of one of the three groups should enable this Honorable Court to determine whether it ought to hear this case on its merits.

The abbreviation (R.) will refer to the stipulated record certified to this Court by the clerk of the Court of Appeals, Fifth Circuit. Copies of the opinion, judgment, and order denying rehearing and the District Court's final summary judgment have been printed as an appendix hereto.

USAFORM Hail Pool, Inc., the named insured, was incorporated in Florida on November 18, 1961, to act as managing agent for a group of insurance companies under a pooling arrangement whereby the Pool Participants shared the risk of insuring farm crops against hail storm damage (R. 36). As managing agent the corporation's functions included:

(a) collecting premiums belonging to the Pool Participants (R. 38, 60, 177, 184, 186);

(b) depositing these premium monies in a trust account (R. 38);

(c) paying from the trust account crop losses owing to insured farmers, and pool expenses (R. 38);

(d) at the conclusion of each pool year, accounting to the Pool Participants for their respective percentage shares of the balance of the monies remaining in the trust account, and remitting the same to them (R. 38);

(e) during the pool year, it was anticipated that approximately $5,000,000.00 in premiums would be deposited by the Pool Participants (R. 60);

(f) USAFORM Hail Pool's sole source of earnings was its commission of 3% of the total premiums deposited with it during the pool year plus a small override determined at the end of the pool year (R. 38).

Substantially all of the assets in the hands of the corporation consisted of the premium monies which belonged to the Pool Participants.

The sole stockholder and chief executive officer of USAFORM Hail Pool, Inc., was F. Wylly Clarke, Jr. (R. 44, 186). The other officers and directors were Clarke's wife, his personal secretary Barbara Murphy, and other

persons dependent on employment by Clarke for their livelihood (R. 36-40, 76-78).

The auditing controls of the corporation were such that the bonding company admitted that only Clarke could steal any substantial sum of money (R. 180-181).

On June 29, 1959, a blanket position or fidelity bond was issued by Fidelity and Deposit Company of Maryland (herein described as F & D) agreeing to indemnify various named corporate insureds, owned or controlled by F. Wylly Clarke, Jr. (herein described as "Clarke"), against any loss sustained through fraudulent or dishonest acts of their employees (R. 11, 44), Clarke being included as a "Covered" employee under the Bond (R. 43, 44, 181). When USAFORM Hail Pool, Inc., was incorporated, it was added to the list of named insureds. The Bond was for $500,000.00 (R. 11). Since Clarke was the only person who could steal a large sum of money (R. 181), it is obvious that the amount of the Bond was dictated by the need to protect against possible theft of Premium money by Clarke. Indeed, it can be safely assumed that Clarke would not misappropriate what money the named insured corporations owned in their own right, since he was "the sole stockholder and alter ego" of the named insured corporations (R. 5, 6, 186).

The Fidelity Bond contained the so-called "in trust and on commission" clause which was Section 5 of the "conditions and limitations", reading as follows:

> "Section 5. The insured property may be owned by the Insured or held by the Insured in any capacity whether or not the Insured is liable for the loss thereof, or may be property as respects which the Insured is legally liable." (R. 11).

Before depositing their premium money with USAFORM for the 1962 crop year, the Pool Participants sought specific assurances from Clarke that their premium monies deposited with USAFORM would be protected under the Fidelity Bond. Clarke wrote F & D on January 16, 1962, advising that the Pool Participants had requested him to inquire as to whether the Pool Participants were protected against misappropriation of their premium monies deposited with USAFORM Hail Pool, Inc. (R. 59-62, 134). On February 1, 1962, F & D replied, flatly stating that the Pool Participants' monies were protected:

> "It is our opinion that the funds in the 'Premium Account' are covered against loss through any of the acts covered by our bond . . ." (R. 64).

Having given these assurances, F & D's letter concluded:

> "We believe the above interpretation should satisfy the Pool's participants as to a possible loss in the premium account due to dishonesty of Hail Pool's employees." (R. 64-65).

The contents of F & D's letter of February 1, 1962, were passed on to the Pool Participants by Clarke (R. 68-69; 132-134; 140-141) and the assurances given were relied on by them (R. 130-137). After receiving these assurances the Pool Participants delivered their premium monies to the Hail Pool and subsequently, on or about July 1, 1962, the Fidelity Bond was renewed (R. 84-85).

At all times since January 16, 1962, F & D:

(a) knew the method of operation of USAFORM Hail Pool, Inc. (R. 43, 178, 193);

(b) knew Clarke was "the sole stockholder and alter ego" of the named insured (R. 5, 6, 43, 186);

(c) accepted Clarke as a covered employee and charged a premium based on listing him as a covered employee (R. 44, 181, 192);

(d) knew that USAFORM Hail Pool's business operation consisted of handling monies belonging to the Pool Participants (R. 60, 177, 178, 184, 186, 193);

(e) knew that the principal asset in the hands of USAFORM was the premium monies belonging to the Pool Participants (R. 38, 177, 184) which would total about $5,000,000.00 for the year (R. 60);

(f) knew that, by reason of the corporation's auditing procedures, and Clarke's control thereof, he, Clarke, was the only employee who could misappropriate any substantial amount of premium monies belonging to the Pool Participants, and knew, therefore, that a bond of $500,000.00 was taken out only to protect against Clarke's possible defalcation (R. 180-181);[2]

(g) knew that Clarke, the sole stockholder and alter ego of the named insured, wouldn't and couldn't steal from himself and therefore the Pool Participants' premium monies were the only thing he would steal;

(h) knew that Clarke was using the Bond to induce the Pool Participants to deposit their premium monies in the USAFORM premium or trust account (R. 59-66);

(i) knew that the Pool Participants were relying on the Bond to protect them against misappropriation of their premium monies by employees of USAFORM Hail Pool, particularly Clarke (R. 60, 65, 175-176);

2. R. O. Barnett, Plaintiff's Claims Manager, with forty-three years' experience, could give no reason, other than the protection of the Pool Participants for taking out a Fidelity Bond on a sole stockholder (R. 216).

(j) knew *everything* about Clarke's operation except that there was misappropriation. As F & D's underwriter testified:

> "Q. Now, the only thing you didn't know about Clarke's operation was that there was misappropriation, isn't that true?
> A. I would say yes." (R. 193).

F & D's chief underwriter admitted on deposition that the Bond contemplated USAFORM's managing funds belonging to others.

> "Q. Now, actually, to your knowledge, F & D's knowledge of the insured's business and the policy, Section 5, that all contemplate a management of funds belonging to others, didn't it?
> A. That is correct." (R. 186).

On February 18, 1963, USAFORM was placed in receivership by order of the Seventh Judicial Circuit Court, Flagler County, Florida (R. 3). An audit of the books of USAFORM Hail Pool, Inc., disclosed a shortage of premium monies belonging to the Pool Participants in the total amount of $311,624.58 (R. 13, 15-25, 108, 109, 111).[3]

Claims were filed on behalf of the named insured and on behalf of the Pool Participants against F & D for the shortages on the ground that the shortages were attributable to the misappropriation of premium monies by Clarke (R. 13). The claims were denied by the Claims Manager of F & D by letter dated August 20, 1963, on the ground that "F. Wylly Clarke, Jr., was never covered under the

3. An audit of the books of U. S. & Foreign Management, Ltd., disclosed that there was a shortage of $277,308.43 in premium money deposits belonging to insurance companies doing business with U. S. & Foreign Management, Ltd. (R. 115). An audit of the books of USAFORM Pan American, Ltd., disclosed a shortage of premium money deposits in the amount of $42,239.21 (R. 118).

Bond" (R. 87)[4] and on the ground that there was no liability to third parties, to-wit the Pool Participants (R. 89).

F & D filed a complaint for Declaratory Judgment in the District Court, Middle District of Florida, based on diversity of citizenship and amount in controversy, asking the Court to determine that the named insureds did not have any claim under the Fidelity Bond by reason of wrongful acts of Clarke (R. 1-9). The complaint alleged that no one of the named insureds, including USAFORM, could have any possible claim under the Bond, because Clarke was "the sole stockholder and alter ego" of each of the named insureds (R. 6), and that these named insureds had "knowledge" of Clarke's wrongful acts (R. 6).[5]

By stipulation filed July 1, 1964, plaintiff and the original defendants (named insureds) agreed that the American Empire Insurance Co. could intervene in the proceeding as class representative for the Pool Participants claiming loss of their premium monies deposited with USAFORM Hail Pool, Inc. (R. 26-29).[6] Admittedly, the Pool Participants had no "knowledge" of Clarke's wrongful acts (R. 190, 210) and it is undisputed that any recovery on the Bond will belong to them (R. 124-127).

On October 25, 1965, the named insureds, through their receiver, filed their Amended Answer and Counterclaims. The named insureds counterclaimed under the

4. This may be contrasted with the testimony of F & D's chief underwriter on deposition that "No question. Clark is covered under the Bond." (R. 181).

5. Of course, the named insureds would have to have knowledge of Clarke's wrongful acts, since he was their alter ego! (R. 6).

6. Stuyvesant Insurance Company was also permitted to intervene as class representative of the Underwriters Group.

Bond for losses arising from the wrongful acts of Clarke. In addition, in separate counts of the counterclaim, they set forth an independent cause of action in fraud, claiming punitive damages based upon F & D's misrepresentations in purporting to insure against misappropriation by Clarke, collecting a premium for insuring him and then denying liability on the ground that he was the sole stockholder and alter ego of the named insureds, and, therefore, "never covered" under the Bond (R. 92-122). F & D has never made any effort to return the premium charged for covering Clarke (R. 192).

The Pool Participants joined in the Amended Answer and Counterclaims seeking to recover under the Bond the losses of premium monies they had suffered and claiming, in separate counts in fraud, punitive damages by reason of the misrepresentations which had been communicated to them with the knowledge of F & D.[7]

F & D moved for a Partial Summary Judgment seeking to eliminate the Pool Participants from the proceeding as a matter of law and to strike all counterclaims seeking punitive damages, based upon F & D's alleged fraudulent acts.

The depositions of F & D's underwriter (C. F. Messinger) and Claims Manager (R. O. Barnett) were taken (R. 142, 194), affidavits were filed (R. 124-138) and briefs submitted. Thereafter the Motion for Partial Summary Judgment was granted in its entirety (R. 254) and made final by the Court.

The Partial Final Summary Judgment entered by the District Court accomplished the following:

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7. Of course, the counterclaims and the Amended Answer were filed on behalf of the members of the Underwriters Group, etc. See Footnote 1 hereof, and pages 100 through 122 of the Record.

(1) Granted a Summary Final Judgment as to the fraud claims of the named insureds who had a direct contract with F & D by virtue of the Fidelity Bond;

(2) granted a Summary Final Judgment as to the fraud claims of the Pool Participants; and

(3) granted a Summary Final Judgment, holding that, as a matter of law, the Pool Participants were neither real parties in interest under Federal Rule 17(a), nor third party beneficiaries of the insurance contract.

The Circuit Court of Appeals, Judge Wisdom dissenting, determined that "the judgment of the . . . District Court in this cause be, and the same is, hereby affirmed."

A Petition for Rehearing was filed March 6, 1969, and denied April 3, 1969, with Judge Wisdom dissenting once again.

REASONS FOR GRANTING THE WRIT

Judge Wisdom opened his perceptive dissent with these words:

> "F & D denied liability on the bond on the stated ground that 'F. Wylly Clarke, Jr., was never covered'. In the complaint F & D alleged that Clarke was 'the sole stockholder and alter-ego of each of the assured'; that his fraud was therefore attributable to the assureds. This position, basic to the complaint, rendered the bond worthless to the persons for whom it was primarily issued—the owners of the premium money in the pool."

F & D accomplished the above described sleight of hand behind a smokescreen of words which obscured the actual risk intended to be covered by the insurance policy

in question. In the process Rule 17(a), F.R.C.P. is literally turned inside out, money is rejected as a proper subject of bailment, rules concerning third party beneficiaries violated, and causes of action pleaded by the insureds actually named in the bond ignored.

Judge Wisdom, calling on the wisdom of Wigmore, puts "underwriting intent" in proper perspective. Support for economic reality also comes from a surprising source, F & D's own Vice President and General Counsel, E. B. McCahan, who has publicly gone on record emphasizing the importance of searching *beyond* the mere words of the bond to determine exactly what risk was intended to be covered.[8]

The Court of Appeals opinion collides head on with the principles spelled out by this Court in *Home Insurance Company* v. *Baltimore Warehouse Company*, 93 U.S. 527, 23 L.Ed. 868, and *California Insurance Company* v. *Union Compress Company*, 133 U.S. 387, 33 L.Ed. 730, 10 S.Ct. 365, with the decision of Eighth Circuit Court of Appeals in *Aetna Insurance Company* v. *Eisenberg*, 294 F.2d 301 (1961), and with the decisions of the Florida Supreme Court in *Holl* v. *Talcott*, 191 So.2d 40, and *Visingardi* v. *Tirone*, 193 So.2d 601.

1. The judgment of the Court of Appeals is in direct conflict with decisions of the United States Supreme Court which hold that where warehousemen, commission

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8. Mr. E. B. McCahan stated in a paper read before the Section on Insurance Negligence and Compensation Law at the American Bar Association meeting at San Francisco on August 7, 1962:

> "I cannot emphasize too strongly the importance of searching beyond the language of the bond, particularly if litigation involves interpretation of controversial language. Exactly what risk did underwriter and insured intend to cover?"

This language is especially significant in the context of the testimony of F & D's underwriter, Messinger, at pages 181 and 186 of the Record. See also the affidavits at pages 130-137 of the Record.

merchants and other bailees take out insurance policies containing clauses similar in import to Section 5 of the F & D bond, such insurance inures to the benefit of the owners of the goods. Thus, in *Home Insurance Company* v. *Baltimore Warehouse Company,* supra, the policy insured the warehouseman against loss of merchandise of his own or held by him in trust or in which he had an interest or liability. This Court held that merchandise held in trust meant merchandise entrusted to the warehouseman by its customers, and covered the full value of the customers' goods. Said Mr. Justice Strong (at page 543):

> "Such insurance is not unusual, even when not ordered by the owners of goods, and when so made it inures to their benefit."

In *California Insurance Company* v. *Union Compress Company,* supra, in construing a clause of a policy insuring property held by a cotton compress company for processing "in trust or on commission", Mr. Justice Blatchford stated (at page 410):

> "The reasoning of the cases where the bailor was the owner of the goods insured by the bailee applies equally to any person, who, having an insurable interest in property, entrusts it to another; and such bailor can, to the extent of his insurable interest, claim the benefit of insurance effected in his favor by his bailee."

It follows from these decisions that if the insurance inures to the benefit of the owners and the owners can claim the benefit of the insurance to the extent of their interest, the owners are third party beneficiaries entitled to sue directly.

The bailor clause in the insurance contract issued by F & D was broader and more explicit than the "in trust

and on commission" clauses involved in the *Home Insurance Company* and *California Insurance Company* cases cited supra. (It should be noted that the majority opinion below categorized a clause identical to Section 5 of the F & D Bond as an "in trust and on commission" clause, R. 275, 276). Section 5 of the F & D Bond insured any property "held by the insured in any capacity whether or not the insured is legally liable for the loss thereof." The insurance coverage, therefore, was property insurance rather than liability insurance, for F & D agreed to pay in the event of loss of the property irrespective of whether or not the named insured could be called upon legally to make good the loss. Coupled with F & D's admitted knowledge of all the facts and circumstances, knowledge of the substantial amounts deposited with the named insured, knowledge of the Pool Participants' reliance on the protection of the Bond, and knowledge that the Bond was being used by Clarke to induce the Pool Participants to deposit premium monies with his corporation—and F & D's acquiescence therein, it is submitted that the policy inured to the benefit of the Pool Participants. As Messinger, F & D's underwriter testified:

> "Q. Now, actually, to your knowledge, F & D's knowledge of the insureds business and the policy, Section 5, that all contemplate a management of funds belonging to others, didn't it?
> A. That is correct." (R. 186).

Looking at the economic realities, as to Clarke's defalcation, the Pool Participants were the *only* insureds under the Bond. Under the decisions of this Court cited above, the Pool Participants should have a right of direct action and should not be required to proceed derivatively through the named insured—the alter ego of the thief causing the loss.

As stated in 7 Fla.Jur., Contracts, Section 101, page 170:

> "However, a third party may sue on a contract intended for his benefit as well as for the benefit of the formal parties thereto. It is said that where a contract creates a right or imposes a duty in favor of a third person, the law presumes that the parties intended to confer a benefit upon him and furnishes him a remedy. And it is held that the law operates upon the acts of the parties to a contract made for the benefit of a third person, and creates the essential privity between the promisor and the third person necessary to a binding legal obligation, even though the primary purpose of the contracting parties was to benefit themselves."

See also *American Surety Co. of New York* v. *Smith*, Fla. (1930), 100 Fla. 1012,130 So. 440, cited by the majority in its opinion:

> "Where, therefore, it is manifest from the nature or terms of a contract that the formal parties thereto intended its provisions to be for the benefit of a third party, as well as for the benefit of the formal parties themselves, the benefit to such third party being the direct and primary object of the contract, or amongst such objects, such third party may maintain an action on the contract even though he be a stranger to the consideration."

See also Wood on Fire Insurance (2d Ed.), page 669:

> "In such cases the terms 'held in trust' or 'on commission' or kindred terms in a policy to an agent, factor or the like, have been held as giving to the owner of the property the right to take the place of the assured, to adopt the contract, and to enforce it, in his own name * * *".

2. The decision of the Fifth Circuit in this case is also in direct conflict with the decision of the Eighth

Circuit Court in *Aetna Insurance Company* v. *Eisenberg*, 294 F.2d 301. Insurer, which had issued a furriers' customer basic policy, brought an action against the insured for a declaratory judgment to have the policy declared void because of the named insured's alleged fraud in understating the value of furs which his customers had stored at his establishment. The named insured's customers were allowed to intervene, and they filed counterclaims seeking a determination that the insurer was liable under the policy for their furs which had been destroyed in a fire. The insurer appealed an adverse judgment in favor of the customers. The Court of Appeals for the Eighth Circuit held that the policy was a third party beneficiary contract, that the customers were the real parties in interest and, as such, could maintain an action on the policy directly against the insurer, further holding that the insurer was estopped to set up against the insured's customers the defense of fraud it had against the insured. The Court of Appeals said:

> "The rights of the third party beneficiaries here were in no sense based on 'subrogation.' The third parties are true beneficiaries and their rights are direct against Aetna and not dependent on Eisenberg. As the Trial Court correctly held, the owners of the property were the real parties in interest and as such could maintain an action on the policy directly against Aetna. (Citing authority)." (At page 306).

The Fifth Circuit Court of Appeals erroneously distinguished the Eisenberg case in its opinion on the ground that "in Eisenberg the contract specifically gave the customers of the insured the right to sue." The Court was confused because *there were two types of policies* discussed in the Eighth Circuit Court's Eisenberg opinion. In addition to the basic insurance policy referred to above, each customer had the option of obtaining a personal fur

floater policy in which he or she *was the named insured.* Aetna admitted that it was directly liable to the customers who had the personal fur floater policies. There was no provision in the basic policy, which named Eisenberg as the insured, giving customers the right to sue, and Aetna contested the right of the customers to sue on the basic policy because under its specific terms only Eisenberg, the named insured, had a right of direct action.

While there are factual differences between the case at bar and the Eisenberg case, the basic principles are the same. (1) In Eisenberg the insurer pointed out that only Eisenberg was the named insured—a similar claim is being made here. (2) In Eisenberg the insurer knew that Eisenberg was advertising insurance coverage by Aetna —in the case at bar plaintiff expected that the assurances contained in its letter of February 1, 1962, that the Pool Participants' property was protected under the bond, would be relayed to them. (3) In Eisenberg there was reliance by the named insureds' customers—in the case at bar, there was reliance on the Bond by the Pool Participants. (4) Eisenberg involved furs belonging to the customers of the named insured—in the case at bar there were premium monies in a segregated account belonging to the Pool Participants. (5) In both cases the insurer fully understood the "named insured's" business operation. (6) Finally, in both cases, the policies cover more than just the legal obligation of the named insured to third parties. As stated in the District Court opinion in Eisenberg:

> "Another point of difference between the bailee's customer policy and an ordinary third party beneficiary contract is that the policy ordinarily covers more than the legal obligation of the bailee to his bailors; it insures the bailor's interest to the extent of the

policy terms, which are ordinarily more extensive than his rights against the bailee."[9]

The law in the Eighth Circuit is further amplified in *Stillwell Frozen Foods, Inc.* v. *North British and Mercantile Insurance Company*, 184 F.Supp. 629. In Stillwell, the owner of frozen food was permitted to recover directly against the insurance company for loss of food held by a frozen food storage company. The District Court observed at page 633:

> "The fact that the plaintiff was not a party to the contract, that it paid no consideration for the contract, and that there was no agreement between plaintiff and Zero Mountain to maintain insurance for the plaintiff's benefit does not defeat the plaintiff's cause of action as a donee beneficiary."

In our case, the facts are stronger because prior to the loss, F & D had been informed as to the identity of the owners of the premium money.[10]

3. In addition to conflicting with the decisions of this Court and the decision of the Eighth Circuit Court in Eisenberg, supra, the decision below violates principles of general law. It has been a long standing rule that the owner of property insured by commission merchants and warehousemen has the right of direct action.

In *Lewis et al.* v. *Home Insurance Company*, 199 App. Div. 566, 192 N.Y.Supp. 170, the insurer claimed that a New York Statute giving warehousemen the right to sue directly for recovery of customers' property preempted the right of direct action by the owner. The Court, in

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9. *Aetna Insurance Co.* v. *Eisenberg*, 188 F.Supp. 415, 420.

10. Clarke's letter to Henderson, Vice President of F & D (R. 59-61) and Messinger's letter to Clarke (R. 64-66).

sustaining the owner's right of direct action, stated (at page 172):

> "The exact question here to be determined has not been before the courts of this state in recent years. In fact, it seems to have been taken for granted that the real owner of goods destroyed by fire can sue in his own name to recover the loss."

(at page 176):

> "The law having been settled for many years that a warehouseman or commission merchant may sue to recover the entire loss as the trustee of an express trust, under Section 449 of the Code, the Defendant now contends that, because the Courts have so held, therefore, the owner of the goods cannot sue. It seems, however, that the law has always been to the contrary. In Wood on Fire Insurance (2nd Ed.), page 669, the rule is given as follows: 'In such cases the terms "held in trust" or "on commission" or kindred terms in a policy to an agent, factor or the like, have been held as giving to the owner of the property the right to take the place of the assured, to adopt the contract, and to enforce it in his own name or that of his agent.' * * *"
>
> "Commission Dwight in Pitney v. Glens Falls Insurance Co., (1875) 65 N.Y. 6, lays down the rule that —'an action on an insurance policy may be brought either in the name of the party by whom or for whom it is made.'"

In *B. N. Exton & Co.* v. *Home Fire and Marine Insurance Co.*, 249 N.Y. 258, 164 N.E. 43, Miller Tompkins & Co. ordered nineteen rolls of paper from Brown Company, a paper manufacturer. The paper was rejected after delivery and the purchase order was cancelled. Brown Company requested Miller Tompkins & Co. to hold the paper at its place of business pending instructions.

The paper was on the premises of Miller Tompkins & Co. when destroyed by fire. Defendant insurance company had insured Miller Tompkins & Co. against loss by fire including the "property of the assured where held in trust or on commission, also the property of others for which the assured may be or agree to become liable in case of loss or damage by fire." Defendant insurer refused to pay the loss.

The Court held that the property of Brown Company was protected under the policy and that Brown Company had the right to sue the insurance company directly. Said the Court (at page 44):

> "We are of the opinion that the policies in this case cover the Brown Company's paper. It was property 'held in trust' by the Miller Tompkins & Co., for the Brown Company, within the meaning which has been given to these words in the insurance business and insurance law."
>
> "The words 'in trust' may with entire propriety be applied to any case of bailment, where goods belonging to one person are entrusted to the custody or care of another and for which the bailee is responsible to the owner. *Stillwell* v. *Staples*, 19 N.Y. 401."
>
> "The phrases describing property 'as held in trust' or 'on commission' and kindred terms, in a policy to an agent, factor, or the like, have been held as giving to the owner of the property a right to take the place of the insured, to adopt the contract, and to enforce it in his own name or that of his agent."

In *Globe & Rutgers Fire Insurance Co.* v. *United States*, (5th CCA, 1953) 202 F.2d 696, the United States Government brought suit against six insurance companies for loss by fire of cotton seeds belonging to the Commodity Credit Corporation in the custody of a cotton gin

company, the named insured, under the insurance policies. Each of the insurance policies provided:

> "* * * this policy shall also cover property sold but not delivered, held in trust or on consignment or for storage."

The Court of Appeals for the Fifth Circuit in that case said (at page 696):

> "Thus the question upon which decision must rest is whether the policy provision quoted furnished insurance protection to the United States against loss of the cotton seed by fire, or covered only the legal liability, if any, of the gin company resulting from such loss."

The Court held that the United States could proceed by direct action, answering the question it posed in the affirmative.

The Court below distinguished the Globe Insurance case by differentiating between fidelity bonds, which it held to be indemnity insurance, and fire insurance which it considered to be property insurance. Said the Court of fidelity bonds:

> "The insurers liability does not arise until the insured has suffered a proven loss. * * * The insurance is not on property but on loss of property." (R. 275).

This alleged distinction is discussed in our Petition for Rehearing, which pointed out that property insurance, such as fire insurance *is* indemnity insurance and the insurer's liability also does not arise until the insured has suffered a proven loss (R. 290-294). Further, as we have pointed out above, Section 5 of the bond covers losses of property belonging to others whether or not the named insured is legally liable for the loss.

In *United States Fidelity & Guaranty Company* v. *Slifkin,* (U.S. D.C. N.D. Ala., 1961) 200 F.Supp. 563, the policy clause was substantially identical with Section 5 of Plaintiff's bond, quoted above:

SLIFKIN POLICY:	USAFORM POLICY:
"The money, securities and other insured property (except the premises) may be owned by the Insured or held by him *in any capacity whether or not the Insured is liable for the loss thereof.*" (200 F.Supp. 563, 574).	"Section 5. The insured property may be owned by the Insured, or held by the Insured *in any capacity whether or not the Insured is liable for the loss thereof,* or may be property as respects which the Insured is legally liable." (R. 11).

The Court, in construing the Slifkin Clause, stated (at page 574):

> "Generally, such a clause is held to insure the bailor's insurable interest under a third party beneficiary theory, it being necessary only that there be an expression in the bailee's policy of an intent to insure the bailor's interest. * * * The express language of this clause gives to the bailor a right to be idemnified under the bailee's policy irrespective of the bailee's legal liability for the loss."

As the Slifkin case points out, Section 5 of the F & D Bond is the expression of F & D's intent that the Pool Participants are intended to be insured and are, therefore, the third party beneficiaries. This is reiterated and amplified by the testimony of F & D's chief underwriter:

> "Q. Now, actually, to your knowledge, F & D's knowledge of the insureds business and the policy, Section 5, that all contemplate a management of funds belonging to others, didn't it?
> A. That is correct." (R. 186).

The Court below distinguished the Slifkin case on the ground that the above quoted clause was an "in trust and on commission" clause. However, as can easily be seen, the so-called "in trust and on commission" clause in the Slifkin case is practically identical with Section 5 of the F & D Bond. Actually, the only factual difference is that (a) the thief in the Slifkin case was an outsider and ours was an employee, and (b) Slifkin involved the theft of jewelry whereas our case involved the theft of money. Money is property and a proper subject for bailment. 8 Am.Jur. (2d), Bailment, Sec. 4, p. 907 (R. 294): To put the proposition in Mr. Justice Blatchford's words in *California Insurance Company* v. *Union Compress,* supra:

> "The reasoning of the cases where the bailor was the owner of the goods insured by the bailee applies equally to any person, who, having an insurable interest in the property entrusts it to another . . ."

See also *Richartz* v. *Martin,* 252 Wisc. 108, 31 N.W.2d 158 (owner of loaned truck permitted to recover directly against insurance company even though not named nor interest referred to in policy). *Miller National Insurance Company* v. *Bunds,* 158 Kan. 662, 149 P.2d 350 (owner of stored grain covered by insurance issued to warehousemen was real party in interest entitled to bring action against insurance company). *General Insurance Co. of America* v. *Goldstein,* 45 N.Y.S.2d 570 (each of customers of dry cleaning establishment had direct cause of action for fire loss against insurance company); 8 Am.Jur. 2d, "Bailments", Section 287, p. 1175:

> "Where the bailee has contracted for insurance on the bailed goods, the authorities generally support the rule that as the real party in interest, or the party beneficially entitled thereto, the bailor may

maintain an action directly against the insurer for the proceeds of the policies which cover the goods 'on account of whom it may concern' or by 'trust and commission' or similar clauses."

4. This Honorable Court has granted certiorari in cases where the Federal Rules of Civil Procedure were involved. Certiorari was granted to review the problem of the construction and validity of Rule 35, Federal Rules of Civil Procedure, 28 U.S.C.A., relating to physical and mental examination of parties to actions. *Schlagenhauf* v. *Holder*, Ind. 1964, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152. In *U. S.* v. *Aetna Insurance and Casualty Company*, 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 171, this Court, considered on certiorari Rule 17(a) of the Federal Rules of Civil Procedure concerning the right of the real party in interest to sue in its own name.

Rule 17(a) provides in pertinent part that every action shall be prosecuted in the name of the real party in interest but a party in whose name a contract has been made for the benefit of another *may* sue in his own name without joining with him the party for whose benefit the action is brought. F & D has succeeded in turning Rule 17(a) inside out so that the real parties in interest, the Pool Participants, have not been allowed by the Courts below to maintain this suit although the insurance proceeds recovered in the suit will go to them.

The rule has always been, as stated in 6 Cyclopedia of Federal Procedure (3rd Ed.—1966 Rev.), Section 21.25, page 374:

"Generally speaking, the party who will ultimately receive the proceeds of any recovery in an action on an insurance policy is the real party in interest and may maintain action in his own name."

This has been the law since *Daniels* v. *Citizens Insurance Company*, 5 Fed. 425 (Circuit Court D. Ind. 1881), where the Court allowed the plaintiff, who was not the named insured, to sue directly on the policy, saying at page 427:

> "In short, the insurance company knew everything that was material to the risk, and that it was the purpose of this arrangement to insure the property, not of Hudson & Bro., but of the plaintiff."

The quoted language of *Daniels* v. *Citizens Insurance Company* applies to the case at bar. The above quote might read as follows:

> "In short, the insurance company knew everything that was material to the risk, and that it was the purpose of this arrangement to insure the property, not of USAFORM HAIL POOL, INC., but of the POOL PARTICIPANTS."

5. The Federal District Court entered a Final Summary Judgment (R. 254) which included a Final Summary Judgment as to Counts V, X, and XI of the Counterclaim which were separate and distinct actions in fraud and deceit on behalf of the named insureds, who had a *direct contractual relationship* with F & D under the Fidelity Bond.

The Court of Appeals determined that the sole issue to be resolved on appeal was whether the Pool Participants and the Underwriters Group were third party beneficiaries of the Bond.[11] The majority said the Bond could not be extended to the intervenors (Pool Participants and

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11. The Court said:

"The sole issue to be resolved in this appeal is whether or not the intervenors are third party beneficiaries of the Bond. . . ." (R. 268).

underwriters) under the "terms of the contract" and concluded:

> "We therefore do not reach the question of punitive damages. . . ." (R. 277).

In expressly affirming the District Court's judgment in its entirety (R. 283) the Court of Appeals overlooked[12] the fact that Counts V, X, and XI of the Counterclaim were separate and distinct actions in fraud and deceit by the *named insureds*, who had a direct contractual relationship with F & D. "Third party beneficiary" had nothing to do with the claims made by the several *named insureds*.

In expressly failing to consider the named insureds' causes of action sounding in fraud and deceit, the Court of Appeals has effectively denied the named insureds their Constitutional right of appeal to that tribunal.

It is respectfully submitted that the foregoing calls for issuance of a Writ of Certiorari. As this Court stated in *Forsyth* v. *City of Hammond*, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (at p. 669):

> "We reaffirm in this case the propositions heretofore announced, to-wit, that the power of this Court in

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12. The second question in the appellants' Brief on appeal specifically raised this question and was based on the second specification of error which read:

> "2. The court erred in finding as a matter of law that each of the counterclaimants had no claim against the plaintiff-insurer insofar as each claimed punitive damages and directing the entry of a Final Summary Judgment dismissing Counts IV, V, X, XI, and XII of the Counterclaim."

Counts IV and XII of the Counterclaim are the Counts which deal with the intervenors' (Pool Participants and underwriters) claims of fraud and deceit. It would appear that the Court of Appeals concluded that intervenors' fraud claims depended on privity of contract or status as a "third party beneficiary". F & D cannot escape the consequences of its fraud on the intervenors simply because there was no formal contractual relationship between intervenors and F & D. Fraud and deceit is an *independent tort* not dependent on contractual relationship. No privity of contract is required (R. 287-290).

certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the Statutes would be finally determined in that Court. And further . . . this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal. . . ."

6. The Summary Final Judgment is in conflict with decisions of the Supreme Court of Florida which forbid granting a summary judgment where there remains any possible issue of material fact and requires that all inferences of fact from the proof proffered be drawn against the movant and in favor of the party opposing the motion. *Holl* v. *Talcott,* (Fla.) 191 So.2d 40, *Visingardi* v. *Tirone,* (Fla.) 193 So.2d 601, *Leaks* v. *Adeimy,* (Fla.) 195 So.2d 47, 48. This justifies issuance of a Writ of Certiorari under Supreme Court Rule 19(b) and *Forsyth* v. *City of Hammond,* supra.

It is respectfully submitted that it is understating your Petitioners' case to say that the facts support a reasonable inference that the Pool Participants were third party beneficiaries, or, at least, real parties in interest. The undisputed facts show:

(a) that the policy specifically insured property of others held by the named insured "whether legally liable therefor or not";

(b) that the policy contemplated the management of the Pool Participants' property by the named insured;

(c) that the insurer knew all the facts;

(d) that the Pool Participants were relying on the Bond—and the insurer knew it;

(e) that the proceeds of any recovery will belong to the Pool Participants.

It is also submitted that the undisputed facts in the Record support inferences of fraudulent conduct on the part of the insurer.[13]

(a) The letter rejecting the claim said "Clarke was never covered under the Bond" (R. 87). Reading this letter in conjunction with Paragraphs 10 and 12 of the Complaint (R. 5, 6) and Messinger's testimony (R. 142-194), one concludes that F & D refused to pay the claims because Clarke was the sole stockholder of the assureds. Yet F & D had known Clarke was the sole stockholder of the assureds (R. 5, 6, 178, 186, 193), and collected a premium for insuring against theft by Clarke (R. 44, 181). All this creates at least an inference that F & D took money for coverage it did not intend to give. F & D even took the position that the Bond had never taken effect as to anyone! (R. 191). F & D never returned any of the premium (R. 191), not even that attributable to Clarke's coverage (R. 192). If Clarke was never covered because he was the sole stockholder, which is what the letter of rejection and complaint say, F & D knew it from the beginning, and was guilty of fraud from the inception of the contract because it collected and retained a premium for coverage it never intended to give.

(b) Read the aforesaid letter of rejection in conjunction with Paragraphs 11 and 12 of the Complaint (R. 6, 7) and F & D is saying that Clarke was never covered (R. 87) because he was guilty of theft prior to issuance of the Bond (R. 6).[14] However, R. O. Barnett,

13. *Smith* v. *Richards*, 13 Pet. 26, 10 L.Ed. 42.

14. This is a claim that the bond never took effect as to anyone (R. 191, 192). However, even Mr. Messinger admits "that if we contend the bond never took effect, there should have been

F & D's claim manager, stated on deposition that he did not believe Clarke guilty of acts of dishonesty at any time (R. 208).[15] All this raises an inference that Barnett was rejecting the claim because Clarke was never covered by reason of his, Clarke's, prior dishonesty, which reason Barnett did not believe (R. 208). This, if true, would be fraud in the adjustment of the claim, a violation of Fla. Stat. § 626.0605.

CONCLUSION

This tribunal over the past two decades has been required to deal with a multitude of problems created by conflict between the individual and the institutions of our society.

Insurance is one of our mammoth industries and the general public has a large stake in it. We respectfully submit that the opinion of the majority of the Court of Appeals is a step backward in insurance law and the protection of the general public. The implications of the decision extend far beyond the fact situation presented and must be related to money management in general. The principles involved herein apply equally to deposits of money and securities with stock brokers, real estate investment companies, title companies, and even banks.

If sophisticated insurance company executives can be misled by assurances such as were given here, how simple to seduce the trusting general public in situations where they are assured that their bailee is "bonded" for the protection of their property.

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a return premium . . . of $1,810.98" (R. 132). He admits that no premium was returned (R. 191, 192). In retaining the premium, F & D has made its election. *Commercial Ins. Co.* v. *Burnquist*, (1952) 105 F.Supp. 920.

15. Compare the Rossiter report (R. 253).

In personal injury litigation insurance carriers are gradually learning that the growing awareness of the worth of the individual makes it good business to settle claims fairly and avoid the possibility of a high verdict for "pain and suffering." The trend has been aided by an able plaintiffs' bar.

In Fidelity Bond cases claimants have been at a terrible disadvantage. It is a highly technical field awash in "fine print" and the competent lawyers are representing the bonding companies, not the claimants. The insurer's exposure is usually limited to a definite amount stated in the bond and there is no risk of a "pain and suffering" verdict. In short, there is little motivation for fair settlement of claims other than that of restless conscience. There is a real need to require a standard of fair dealing between the insurer and the insured in situations such as we present to the Court in this case.

For all the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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